

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARENCE W. WASHBURN and DEPARTMENT OF THE ARMY,
FORT PICKETT, Fort Pickett, Va.

*Docket No. 96-2094; Submitted on the Record;
Issued August 4, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in appellant's case in the amount of \$947.34 for the period of August 1, 1995 through March 2, 1996; and (2) whether appellant was at fault in the creation of the overpayment.

On August 26, 1991, appellant, then a 44-year-old plumber, sustained a lumbar strain. The Office also accepted the claim for L5-S1 ruptured disc surgery. Appellant was placed on the periodic compensation rolls for total temporary disability effective April 5, 1992 at the three-quarters compensation rate for an employee with a dependent.

By letter dated February 10, 1993, the Office stated that, upon turning 18 years of age, appellant's daughter would remain a dependent for purposes of augmenting benefits only if she remained unmarried and pursued a full time course of study. The Office specifically instructed appellant to notify it if his daughter stopped attending school or changed her status as a full-time student. On February 14, 1993 appellant completed a form indicating that his daughter was a full-time student.

Appellant returned to work in a light-duty position on March 2, 1993 and his compensation was reduced accordingly.

The Office subsequently accepted appellant's claim for a lumbar laminectomy which was performed on June 17, 1993. Appellant then continued receiving compensation for total temporary disability on the periodic rolls at the three-quarters compensation rate for an employee with a dependent.

The Office approved additional back surgery on February 8, 1995.

On December 18, 1995 the Office again informed appellant that, upon turning 18 years of age, appellant's daughter would remain a dependent for purposes of augmenting benefits only if she remained unmarried and pursued a full-time course of study.

On January 3, 1996 appellant informed the Office on a Form EN-1617 that his 20-year-old daughter was no longer pursuing a full-time course of study or training.

By letter dated January 29, 1996 appellant indicated that his daughter did not return to school in August 1995. Appellant stated that he notified the employing establishment by telephone and returned a Form EN-1617 indicating the same information. He stated he again filled out a Form EN-1617 after receiving the Office's December 18, 1995 letter. Appellant stated he could not return any checks because he received direct deposits.

By letter dated March 21, 1996, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in this case in the amount of \$947.34 because he was paid compensation at an augmented rate three-quarters rate from August 1, 1995 through March 2, 1996, but his daughter stopped attending school and, therefore, he was entitled to only a two-thirds compensation rate. The Office advised appellant that a preliminary finding had been made that he was at fault in the creation of the overpayment because he failed to furnish information about the change of status of his dependent which he knew or should have known to be material. Appellant was advised to submit additional evidence or argument if he disagreed with the finding that an overpayment occurred, the amount of the overpayment, or the finding of fault.

On March 26, 1996 appellant indicated that he had informed the employing establishment in August 1995 that his daughter did not return to school. He also stated that he provided this same information to the Office on Form EN-1617s in December 1995 and January 1996. Appellant further indicated he never saw his compensation checks because he received direct deposits.

By decision dated June 17, 1996, the Office finalized the preliminary finding dated March 21, 1996.

The Board finds that the Office properly determined that an overpayment of \$947.34 was created for the period of August 1, 1995 through March 2, 1996 because appellant was paid an augmented rate of compensation for that period of time although he had no eligible dependents.

In this case, appellant stated that his daughter did not return to school in August 1995. Appellant, however, continued to receive compensation for temporary total disability at a three-quarters augmented rate for having a dependent from August 1, 1995 through March 2, 1996. Appellant, therefore, received an overpayment because he received \$12,423.93 in augmented compensation benefits when he should have only received compensation benefits of \$11,049.46. This constituted an overpayment of \$1,374.47. The Office, however, properly deducted \$427.13 from the overpayment because appellant paid \$747.33 in additional health insurance premiums for having a dependent when he should have only paid \$320.20 for health insurance premiums for himself. The Office, therefore, properly found that appellant owed an overpayment of \$947.34 for the period of August 1, 1995 through March 2, 1996.

The Board, however, finds that the Office improperly found that appellant was not "without fault" in the creation of the overpayment and, therefore, that the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act¹ provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."² If an employee is not "without fault" the overpayment is not subject to waiver.³

Section 8129 allows for waiver of an overpayment of compensation when a claimant is without fault in the creation of the overpayment of compensation. Concerning whether an individual is with fault in creating an overpayment, the Office's regulations provide in relevant part:

"In determining whether an individual is with fault the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."⁴

In this case, the Office applied the second standard -- failed to furnish information which the individual knew or should have known to be material -- in finding that, upon review of the totality of the circumstances, appellant was at fault in the creation of the overpayment which resulted from appellant's receipt of augmented compensation benefits when he had no eligible dependents. The record reveals that by letter dated February 10, 1993, the Office stated that, upon turning 18 years of age, appellant's daughter would remain a dependent for purposes of augmenting benefits only if she remained unmarried and pursued a full-time course of study. Moreover, the Office specifically instructed appellant to notify it if his daughter stopped attending school or changed her status as a full-time student. On February 14, 1993 appellant demonstrated his knowledge of this requirement by completing a form indicating that his daughter was, at that time, a full-time student.

¹ 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8129(b).

³ *Monroe E. Hartzog*, 40 ECAB 322, 331 (1988).

⁴ 20 C.F.R. § 10.320(b).

Appellant asserted that he informed the employing establishment that his daughter was no longer a full-time student in August 1995 and that he notified the Office of this information in December 1995 and January 1996. The record, however, reveals that appellant first notified the Office of the change in his daughter's status in a Form EN-1617 dated January 3, 1996.⁵ Inasmuch as appellant had knowledge of the requirement to report changes in his daughter's status as a full-time student, he is not "without fault" for the overpayment created from August 1, 1995 through January 3, 1996, the date he notified the Office of the change in status, and this portion of the overpayment cannot be waived. Appellant, however, may be "without fault" for the overpayment created after January 3, 1996 because appellant clearly notified the Office of the change in his daughter's status as a full-time student. Accordingly, this case is remanded for the Office to consider whether appellant is at fault for the overpayment created between January 3, 1996 and March 2, 1996 and, if necessary, whether it should be waived.

The decision of the Office of Workers' Compensation Programs dated June 17, 1996 is affirmed in part, vacated in part, and the case remanded for further development in accordance with this decision.

Dated, Washington, D.C.
August 4, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ The record is devoid of any evidence establishing that appellant notified either the employing establishment or the Office of the change in his daughter's status as a full-time student prior to this time.